Nos. 35, 52

IN THE

Supreme Court of the United States

October Term, 1969

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FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents

CLIFFORD M. HARDIN, Secretary of Agriculture,
Petitioner

v.

RUSSELL ALLEN, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE STATE OF VERMONT

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The State of Vermont, as *Amicus Curiae,* pursuant to Rule 42 of the Rules of this Court, respectfully urges affirmance of that portion of the decision of the court below which has been appealed

by the petitioners herein, and hereby concurs with the counter-statement of the questions presented, counterstatement of the case and argument as set forth in the respondents' brief herein.

INTEREST OF THE AMICUS CURIAE

The State of Vermont, by and through its Attorney General, represents the interests of the dairy farmers of the State of Vermont, almost all of whom are so-called "non-nearby producers" like respondents and who, as a result of the differential payments at issue herein, are required indirectly to pay to the dairy farmers of Massachusetts, Rhode Island and portions of Connecticut ("nearby producers") an amount equal to 46¢ or 23¢ per hundredweight of milk sold by the nearby producers. 7 C.F.R. 1015.70, 1015.72 (1968).

In 1968, almost half of the producers operating under the 1964 Massachusetts-Rhode Island Milk Order ("the Order") here at issue were located in Vermont. *Mass.-R.I.-N.H. Milk Market Statistics* (Market Administrator Fed. Order No. 1, March 1969), p. 5. (Hereinafter *"Statistics"*). Over two thirds of Vermont's total dairy production is sold under this Order. *Statistics,* p. 5; *Biennial Report of the Vermont Commissioner of Agriculture* (1968), p.51. (Hereinafter *"Biennial Report"*). Moreover, not only is the Vermont dairy industry highly dependent on the Massachusetts-Rhode Island market, but the Vermont dairy industry, in turn, provides over three-quarters of the total dollar receipts from Vermont agricultural products. *Biennial Report,* p. 29. Thus, the regulated Massachusetts-Rhode Island market for dairy products represents about half of the *total* market for *all* Vermont agricultural products. When it is considered that agricultural business is the number one industry in the state, the enormous significance of the nearby differential to the *amicus curiae* becomes plain.

The Vermont dairy industry which, as indicated above, is highly dependent on the Massachusetts-Rhode Island market, is no longer able to afford the payment of a differential-type "tariff" for the privilege of selling milk in southern New England. This mainstay of the State's economy has suffered a serious decline in recent years and Vermont dairymen are being financially squeezed to the point of having to abandon their operations. Thus, there has been a steady decrease in the total number of Vermont producers, total number of herds and total number of cows to the point where in 1968 these figures were at their lowest level in the Twentieth Century. *Farming Trends in Vermont,* Misc. Pub. 52, University

of Vt. (1968), pp. 1-7. The number of producers and percentage share of Vermont producers in the Massachusetts-Rhode Island market is similarly at its lowest point ever. *Statistics*, p. 5. The only effect of the "orderly market carefully nurtured and maintained"[1] under the Secretary of Agriculture's Order has been to cost Vermont producers 1.75 to 2 million dollars annually and to accelerate their departure from the market in favor of the larger and more prosperous urban area "nearby producers".[2] This is a matter of great concern to the people of Vermont and, moreover, should be of great concern to the people of southern New England who are dependent upon the Vermont dairy industry for half their milk supply.

The fact is that the "nearby differential" has since 1949 been introduced by the Secretary even into areas like Worcester, Springfield and Connecticut purely as an illegal form of protection to Massachusetts and Connecticut "nearby producers." See 14 Fed. Reg. 7085, 7097 (1949), 24 Fed. Reg. 1049 (1959). The Connecticut differential was not even introduced until 1959 and then only because it existed in surrounding markets. 24 Fed. Reg. 1049 (1959). The economic justification for the differential, if it ever existed, has long since disappeared and, in any event, there has never been and would be today no "customarily applied" nearby differential in any unregulated New England market. Moreover, the very exaction of a differential under an order requiring only the payment of *minimum* prices by handlers is a clear admission that the differential would not exist under unregulated conditions.

There are absolutely no differences between Vermont and southern New England dairy farms in the factors of "availability" and "reliability" (as claimed at page 3 of the Brief *Amici Curiae*) and "accessibility" is meaningless in this day of bulk tank delivery

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[1] See p. 7 of the Brief *Amici Curiae* of the Attorneys General of Massachusetts, Rhode Island and Connecticut (hereinafter referred to as "Brief *Amici Curiae*").

[2] In 1966, prior to the entry of the escrow injunction herein, there were 1,594,780,000 pounds of Vermont milk sold in the Massachusetts-Rhode Island milk market. *Statistics* (March 1967), p. 5. The cost of the farm location differential to so-called distant producers was at least twelve cents (12¢) per hundred weight. See *Market Administrator's Review*, Vol. 19, No. 1, p. 1 (Jan. 1967). Therefore, the total cost of the differential to the Vermont dairy industry in 1966 was $1,913,736.00.

and high-speed Interstate highways. Moreover, "eveness of production" for individual producers, no matter where located in the milkshed, is already compensated for under the seasonal adjustment fund of the Order and should not be rewarded twice. See 32 Fed. Reg. 5286 (1967). Finally, many elements of the cost of production for Vermont "non-nearby producers" have reached the level of "nearby producers" costs, including equipment, feed, livestock and even land values (due to recreational demand), and if the nearby differential was ever equitably justifiable on that ground, such justification is a thing of the past.[3]

Far from acquiescing in this unwarranted discrimination (as implied on p. 3 of the Brief *Amici Curiae*), Vermont farmers have fought the nearby differential, which exists nowhere else in the country except New England, at every opportunity since its inception, including, for example, the 1951 hearings on the proposal to eliminate such payments to nearby producers. See 16 Fed. Reg. 9250 (1951). Vermont farmers have, of course, been forced to accept the differential in order to obtain the advantages of federal regulation. But there is no question that the differential was from the beginning an involuntary "sweetener" to the nearby producers and the Massachusetts Milk Control Board to induce them to cooperate with federal regulation. See *Zuber v. Allen*, 402 F.2d 660, 664 (D.C. Cir. 1968).

The "windfall," if any, has been to southern New England dairy farmers who have long been aware that the nearby differential rests on precarious legal and economic grounds. If, as claimed by the *amici curiae,* termination of the differential will bring pressure for increases in Class I (fluid milk) prices, thereby raising retail prices to consumers (Brief *Amici Curiae*, p. 11), this will simply mean that the southern New England dairy farmer

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[3] For example, as of November 1968, the value per acre of Massachusetts farm real estate had gone up only 53% since 1960, while Vermont farm real estate had gone up 79% in value during the same period. *Farm Real Estate Market Developments,* CD-72, U. S. Dept. of Agriculture (March 1969), p. 6. So, too, average dairy feed prices paid by Vermont farmers in February 1969 were about the same or slightly higher than prices paid in southern New England. *Agricultural Prices,* U. S. Dept. of Agriculture (Feb. 15, 1969), p. 27. In the case of "nearby producer" farms actually located in close proximity to metropolitan areas where land values remain higher than in Vermont, such farms are now inevitably being held for sale or sold to land developers and cannot be considered as "available" or "reliable" sources of milk supply in any meaningful long term sense.

refuses to participate in the subsidization of the southern New England consumer, a subsidy now being borne only by Vermont and other "non-nearby producers." Certainly the termination of the differential in the New York-New Jersey market as ordered by *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966), has not created any significant market disruption and no price increases have resulted which can be attributed to the court's decision. See 33 Fed. Reg. 9502, 12849 (1968). The Massachusetts-Rhode Island Milk Order may "have worked in practice for over three decades in successfully maintaining 'orderly marketing conditions' " (Brief *Amici Curiae,* p. 7), but these conditions have at least since World War II heavily favored the southern New England dairy farmers who cry poverty and yet in 1967 recovered average net farm income 25% higher than Vermont farmers. See 1967 *ELFAC Dairy Farm Business Analysis* (University of Vt., October 1968), p. 3.

Thus, as the foregoing makes clear, elimination of this unlawful and discriminatory differential is of the most critical importance to the State of Vermont, *amicus curiae,* and to its dairy farmers, who already labor under a justifiable transportation differential handicap in their sales to the southern New England "distant" markets and who, under today's economic conditions, can no longer competitively stand the additional handicap of the protectionist "nearby differential."

ARGUMENT

THE NEARBY DIFFERENTIAL IS NOT A "MARKET . . . DIFFERENTIAL CUSTOMARILY APPLIED" BY HANDLERS SUBJECT TO THE MILK ORDER AT ISSUE HEREIN AND IS THUS UNLAWFUL

Petitioner nearby farmers and the Secretary of Agriculture ("Secretary") acknowledge that the farm location or "nearby" differential at issue herein is lawful only if it is a "market . . . differential customarily applied" by handlers subject to the Order within the meaning of Sec. 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 (hereinafter "the Act"). See Petitioner's Brief, p. 26; Secretary's Brief, p. 18. Thus, the nearby farmers and the Secretary have apparently abandoned their previous efforts to fit the nearby differential under one of the other statutorily authorized adjustments which the Act permits in setting

the uniform blended price for milk.[4] However, as is made clear hereinafter, the nearby differential is no more justifiable as a "market differential" than it is as a "location" or other type of permited adjustment.

First, the contemporaneous Congressional reports with respect to the Act specifically state that:

> "(t)he market differential is a differential which is given to the producer *to compensate him for delivering milk to a city market instead of to a country plant.*" H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess., 10 (1935). (Emphasis supplied).

Yet the nearby differential at issue herein is based solely upon *the location of the producer's farm* and not whether he, in fact, saves expense for the handler by delivering milk to a city market instead of to a country plant. In fact, a nearby producer who delivers to a country plant (as many do) still receives the alleged "market differential," while a "non-nearby" producer who delivers to a city market receives no such differential. Moreover, a differential for such direct delivery is already included in the Secretary's so-called "zone differential" under the Order. These zone differentials vary inversely with the distance from Boston of the handler's plant to which the producer delivers his milk and, according to the Secretary, "must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants." 7 C.F.R. Sec. 1001.62 (1968); 29 Fed. Reg. 11205, 11210 (1964).[5]

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4. Sec. 8c(5)(B)(ii) of the Act provides that the uniform price shall be subject *"only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk desired, (c) the locations at which delivery of such milk is made, and (d) a further adjustment . . . ." (Emphasis supplied). (The last adjustment pertains to base rating and has no relationship to the nearby differential involved herein). In *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966), the nearby farmers and the Secretary argued that a nearby differential in substance identical to the differential here at issue was a "location" adjustment and did not even attempt to justify the differential as a "market differential." See 370 F.2d 238, n. 37.

5. The Secretary stated as follows on August 4, 1964, in reducing the zone differential from 54 cents to 47 cents:
"3. *Zone differentials and zoning.* * * * The present nearby plant Class I zone differential of 54 cents is based on two principal factors:

Secondly, the Secretary's own justifications for the nearby differential, as set forth in the Order, *say nothing whatsoever about direct delivery to city markets* but, instead, are entirely limited to the historical fact of higher payment to nearby producers in the Boston area due to their better competitive position in the 1930's and to the statutorily forbidden factor of fluid (Class I) use of their milk.[6] Thus, in issuing the Order in 1964, he stated:

> "Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal con-

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(1) Freight charges for hauling milk from plants located in the 21st zone to city plants, and (2) *the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers.* The total freight charge allowed in the present differential is 41 cents per hundred weight, which includes a Federal transportation tax no longer in effect. In earlier computations of the difference between country and city receiving costs, total *country plant handling costs* were considered to be 23 cents per hundred-weight. Of the latter amount, 20 cents represented the cost of operating the country plant and the remaining three cents was to cover the cost to the handler in furnishing cans for the shipment of milk from the country plant to the city plant. Handling costs for receiving, weighing, and testing milk received from farms at the city plant were considered to be 10 cents per hundredweight, with the difference between this amount and the country plant handling costs thus being 13 cents.

* * *

It is therefore concluded that the allowance for transportation to be reflected in the city plant zone differential should be 37 cents. Further, the *handling allowance* to be reflected in this differential should continue to be 10 cents. Accordingly, the Class I price applicable at nearby (city) plants under the Connecticut order and the proposed Massachusetts-Rhode Island order would be 47 cents greater than the Class I price at plants located in the 21st zone." (29 Fed. Reg. 11210-11211). (Emphasis supplied).

[6] Sec. 8c(5)(B)(ii) of the Act states that a uniform blended price shall be paid to all producers "irrespective of the uses made of such milk by the individual handler to whom it is delivered," subject only to the enumerated adjustments.

sumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

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. . . we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates." 29 Fed. Reg. 11205, 11213-14 (1964).

And, for example, in justifying the nearby differential in the 1958 southeastern New England order (now consolidated into the 1964 Massachusetts-Rhode Island Order), the Secretary explained that

"Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England *have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market.* Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without market-wide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization." (Emphasis supplied). 23 Fed. Reg. 8238 (1958).

As the foregoing abstracts make clear, the nearby differential was not promulgated by the Secretary as a "market differential"

for direct delivery by nearby producers, of the type as authorized by the Act, but was, in fact, justified as exactly the type of extra payment for fluid (Class I) use of milk which is expressly proscribed by the Act[7].

Finally, in view of the above demonstrated patent unlawfulness of the nearby differential, it becomes unnecessary to consider whether, as claimed by the southern New England Attorneys General, the lower courts should have deferred to the Secretary's administrative "expertise." (Brief *Amici Curiae,* pp. 4-7). See *SEC v. Chenery Corp.,* 318 U.S. 80, 87 L.Ed. 626, 636 (1943) ("... an order may not stand if the agency has misconceived the law"). Also irrelevant is the Attorneys General's concluding argument that, somehow, the clause in the Act requiring uniform prices "irrespective of the uses made of such milk by the individual handlers to whom it is delivered"[7] does not mean what it says, but really permits a differential based upon fluid milk use so long as it is not such use by a given individual handler (see Brief *Amici Curiae,* pp. 12-15). This argument is irrelevant because of the fact that, as clearly shown above, the nearby differential is not, in the first instance, a "market differential" or any other permitted type of differential.

Thus, since the nearby differential at issue herein does not depend upon the nature of the market to which delivery is made and cannot be fitted within the permitted "market differential" adjustment category (and, in fact, has never until this proceeding been claimed to be "market differential"), and since petitioners and the Secretary admit that the nearby differential is not an adjustment otherwise permitted under the Act, the efforts by petitioners and the Secretary to legitimatize this unlawful discrimination must fail.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the respondents' brief, the decisions of the court below should be affirmed and the escrow fund distributed in full to the non-nearby producers.

Respectfully submitted,
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[7] Sec. 608(c)(5)(B)(ii).